UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

DDI-3527-74

TO : Distributees

DATE: Dec. 2, 1974

FROM : Robert L. Saloschin
Office of Legal Counsel

SUBJECT: Draft of "Preliminary Guidance" memorandum for immediate agency responses to the 1974 Freedom of Information Act Amendments.

Attached hereto please find a copy of subject draft for your urgent review.

It is our intention to have this "Preliminary Guidance" distributed to all agencies at the earliest practicable date, if possible at the beginning of next week, in order promptly to alert and assist the agencies on matters which they must act upon or consider quickly in preparation for the February 19, 1975 effective date of the new amendments. As noted in item 9 ("Further Action") of the attached draft, we plan to provide additional guidance materials before the February effective date.

Please let us have any comments which you feel we should consider before distributing this "Preliminary Guidance" as soon as possible, and in any case no later than 2 P.M. Friday, December 6th. Comments which suggest additions, deletions, or modifications of language in the draft should be accompanied by the text of proposed inserts or revisions where this will expedite consideration of the comments.

Please also advise us by the time indicated above whether you believe a meeting is necessary ~~later this week~~ to discuss the comments referred to above. It is our hope to avoid the delay such a meeting is likely to involve at this time, particularly since the guidance to be distributed now is only preliminary and is subject to possible correction later. If such a meeting is to be held it will be at 10 A.M. Monday, December 9th on the basis of telephone notice.

Office of the Attorney General
Washington, D. C. 20530

DRAFT -- 11/26/74 December , 1974.

MEMORANDUM TO HEADS OF ALL
FEDERAL DEPARTMENTS AND AGENCIES

Re: Preliminary Guidance concerning the 1974 Freedom of Information Act Amendments, P.L. 93-502, enacted November 21, 1974.

Introduction

By action of the Senate on November 21st in overriding by a 65 to 27 vote the President's veto of the enrolled bill H.R. 12471, several important amendments have been made in the Freedom of Information Act, 5 U.S.C. 552. Most of these amendments will have some effect upon your agency.

These new amendments (hereinafter the "1974 Amendments") will become effective on February 19, 1975. It is essential that every agency take certain actions as soon as possible, as discussed below, in order to be in compliance with the 1974 Amendments when they become effective.

Outline of Discussion

1. Time Limits for Agency Determinations
2. Index Publication
3. Uniform Agency Fees
4. Procedures on Requests for Classified Records
5. Requirements for Annual Report
6. Assignment of Responsibility
7. Retrospective Aspects
8. Miscellaneous Matters
9. Further Actions

Attachments:

A. Freedom of Information Act prior to 1974 Amendments
B. 1974 Amendments to the Act (P.L. 93-502)

C. Freedom of Information Act as now amended
D. Summary of Principal Changes made by 1974 Amendments
~~E. November 1974 list of court decisions under the Act, with notations as to the exemptions, etc., involved.~~

Discussion

1. Time Limits for Agency Determinations. Agencies must amend their regulations to conform to the provisions in the 1974 Amendments which prescribe administrative time limits for processing requests for access to their records. Basically, these provisions call for an initial determination to be made on any such request within 10 working days (usually two weeks) after its receipt. In case of an appeal from an initial denial, a determination on the appeal is to be made by the agency within 20 working days (four weeks) after receipt of the appeal. After any agency determination to comply in whole or part with a request for records, whether made initially or on appeal, the records shall be made available "promptly".

These time limit provisions apply to requests and to appeals that are received by agencies on or after Wednesday, February 19, 1975. Agency regulations under the Act should be revised to reflect these provisions and the revisions should be published in the Federal Register and distributed to all concerned agency personnel before that date.

The above time limits should prove generally adequate, or more than adequate, for the proper processing of ordinary requests in normal circumstances. The discussion which follows is chiefly concerned with the impact of the time limits on requests which, for one reason or another, an agency finds difficult properly to process within such periods.

It is important to note that these time limits run from the date of "receipt". The experience of the Justice Department with voluntarily adopted time limits for acting on requests and appeals for our own records has indicated that much time can be lost in mail rooms and elsewhere in routing requests and appeals to those who must act upon them. Such delays can be

sharply reduced by very explicit and well-conceived instructions to requesters on how to address their requests and their appeals. It is strongly recommended that such instructions be contained in agency regulations, as well as in any other pertinent agency information and guidance materials that may be prepared. Absent such instructions, a requester would ordinarily be justified in expecting the agency to treat as the date of "receipt" the date on which his request or appeal was received in some part of the agency, in which case the time required to identify the proper part of the agency and to transmit the correspondence to it would be subtracted from the time remaining for work upon it. In addition, agencies should consider devising other measures to make sure that such requests and appeals are conspiciously identified, upon their receipt, to emphasize to all personnel the need for expeditious handling and action.*/

The 1974 Amendments contain two provisions for extension of the foregoing time limits. One authorizes administrative extensions by giving requesters written notices with prescribed contents in three types of "unusual circumstances" which are specified in the amendments. Such extensions are limited to an aggregate of 10 working days on any one request--i.e., a 10-day extension may be invoked by the agency only once, either during the initial review of the request or during appellate review. This means that if a ten-day extension notice is issued for making an initial determination of a request, no administrative extension will be available for processing an appeal from an initial

*/ While it is sometimes impossible to be sure whether a request is made under the Act, it is often sound practice to resolve such doubts by treating the request as made under the Act.

denial. Yet experience suggests that some of the same circumstances which make a particular request difficult and time-consuming to process to an initial determination may also come into play in processing an appeal from an initial denial. Accordingly, agencies should carefully consider whether they should make some provisions in their regulations concerning (a) who controls the use of the 10-day extension and (b) the allocation of it to the initial stage, the appeal stage, or partly to one and partly to the other. Such provisions, of course, would only operate in the unusual circumstances specified in the statute, but subject to this condition agencies would appear to be free to control the use of such extensions either on a wholly case-by-case basis, by firm allocations to one stage, to the other stage, or five days to one and five days to the other (with the first five available if needed in the appeal stage in cases where it was unused at the initial stage), or in some other manner. Agencies should also be prepared to instruct their staffs on the form, contents, and timeliness of extension notices in the light of the statutory requirements.

The second provision for time extension in the 1974 Amendments authorizes a court to allow an agency "additional time to complete its review of the records" if the government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request. In cases where an agency believes that this provision would probably lead to a judicial extension of its time if the agency were to be sued immediately, it may be appropriate for the agency to advise the requester informally of such belief, and to suggest to the requester the possibility of agreeing with the agency upon a specific extension of time as needed for the agency to make its determination, in the interests of seeking to minimize unnecessary litigation and exploring adequately the scope of a possible administrative grant of access. In preparing its regulations on time limits, an agency should consider (a) who within the agency should give attention to the considerations

discussed in this paragraph, and (b) the extent to which communications or agreements with requesters under this paragraph should be recorded for such bearing as they may have on possible litigation.

The only legal consequence provided in the 1974 Amendments for an agency's failure to adhere to the prescribed administrative time limits (i.e., the 10 and 20 day limits and any up-to-10 days extension effected by notice to the requester) is that, in case the requester sues under the Act, the government cannot have the suit dismissed as premature for failure of the requester to exhaust his administrative remedies, since the Act as amended expressly provides that the requester "shall be deemed to have exhausted his administrative remedies" in case the agency fails to comply with applicable time limits. THIS MEANS THAT IF THE 10-DAY LIMIT FOR INITIAL DETERMINATIONS (TOGETHER WITH ANY PERMISSIBLE EXTENSION OF THIS LIMIT BY NOTICE FOR UP TO 10 DAYS IN "UNUSUAL CIRCUMSTANCES" OR BY AGREEMENT WITH THE REQUESTER) IS NOT COMPLIED WITH, THE REQUESTER CAN SUE IMMEDIATELY, THE SUIT CANNOT BE DISMISSED AS PREMATURE FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, AND THE AGENCY MAY HAVE LOST THE 20 DAYS OR MORE THAT OTHERWISE WOULD HAVE BEEN AVAILABLE TO IT IN THE EVENT OF A TIMELY DENIAL AND AN APPEAL. Accordingly, every effort should be made to issue an initial determination, even one with some qualifications or conditions,*/ within the required time. However, in the event an agency fails through inadvertance, illness or death of assigned or available personnel, or other circumstances beyond its control for which it cannot extend the time, to issue a timely initial determination and is sued, it should nevertheless continue to process the request. To the extent that the request is granted, the suit may be expected to become moot; to the extent the request is denied, the government will be able to prepare a defense on the merits.

If an initial denial in whole or part is issued by an agency after suit has been filed and the requester administratively

*/ The qualifications or conditions cannot be so extensive as to render the response meaningless because such a response would not constitute the required "determination".

appeals the initial denial, the court in which the suit is pending should be informed of this fact through counsel representing the agency in the suit, and unless otherwise instructed by such counsel or by the court, the agency should proceed to process the appeal under its regulations. Where suit but no administrative appeal has been filed by a requester, agencies may wish to consider whether they should make some provision for the filing of an administrative appeal on the agency's own motion. If suit is filed while an appeal is pending, whether or not the suit is premature, the agency should normally continue to process the appeal.

Although the only direct legal consequence of an agency's failure to adhere to the administrative time limits may be the loss in court of the defense of failure to exhaust, this in itself may be a severe sanction, in terms of the litigation or the orderly performance of agency functions. Moreover, members of the public who read the Act as amended will not fail to note that the prescribed time limits are cast in legally mandatory terms, i.e., they are preceded by the word "shall". Accordingly, consistent with other duties imposed upon an agency by law, agencies must adhere to these time limits if at all possible. To the extent this may involve an unavoidable conflict with the performance of other duly prescribed agency duties on which no time limit has been imposed by law, it should generally be assumed that first priority must be given to the processing of requests and appeals under the Act as amended.

The time limit provisions of the 1974 Amendments obviously appear to presuppose that all agencies will have a basically two-step, rather than a single-step, procedure in their regulations, i.e., that they will provide for an initial determination whether to grant or deny access, followed by an administrative appeal to higher agency authority, rather than providing for one agency action on the request which is administratively final. While there is nothing in the 1974 Amendments which expressly forbids an agency from having a single-step procedure, it seems clear that the vast majority of agencies will continue to use some form of two-step procedure, not only because of its advantages in correcting errors and minimizing unnecessary litigation but also because a single-step procedure could not utilize the 20 days which the 1974 Amendments allow for processing appeals. In this connection it is also important that agencies contemplating changes in their regulations from a single-step to a two-step procedure, or changes to a different form of two-step procedure, carefully note that the 1974 Amendments contemplate an administrative "appeal", not a reconsideration. This means that the agency official who is charged with the responsibility of acting on appeals from denials must be different from the official or officials who are authorized initially to deny requests under the Act.

The regulations of some agencies now prescribe a period of time, such as 30 days, within which a requester must file any appeal from an initial denial, with such a time period ordinarily running from the requester's receipt of the denial letter. The 1974 Amendments contemplate that an initial determination to furnish records will be dispatched within the time limits imposed upon the agency, but that the records which are being made available to the requester may follow "promptly" thereafter. Thus, at the time of the initial determination there may be some uncertainty or confusion on the part of the requester, or even on the part of the agency, as to the precise extent of the materials being made available and being denied. Accordingly, if an agency's regulations as revised contain a time limit for the filing of an appeal, it is suggested that the period run from receipt of the initial determination (in cases of denials of an entire request), and from receipt of any records being made available pursuant to the initial determination (in cases of partial denials). Such a provision will in no way interfere with a requester's right to file an appeal immediately after any initial determination involving any degree of denial, but it should promote fairness, help reduce premature and unnecessary appeals, and minimize technical questions about the timeliness of appeals.

4. Index Publication. Under subsection (a)(2) of the Act prior to the 1974 Amendments, each agency has been required to "maintain and make available for public inspection and copying a current index providing identifying information for the public" as to the agency's so-called (a)(2) materials, i.e., certain final opinions and orders, statements of policy and interpretation, and administrative staff manuals and instructions. Under the 1974 Amendments, this index will be required to be published promptly at quarterly or more frequent intervals and distributed, unless the agency determines by order published in the Federal Register that such publication would be unnecessary and impractical, in which case copies of the index shall be provided on request at duplication cost. Therefore, on or before February 19th, 1975, or "promptly" thereafter, each agency must ~~immediately~~ publish the required index, or must adopt and publish in the Federal Register an order containing the determination referred to above.

If an agency already publishes or plans to publish indexes to some of its (a)(2) materials in compliance with the above publication requirement, but determines that it is unnecessary and impractical to publish its indexes of the remainder of such materials, there is apparently no objection under the 1974 Amendments to using a combination of publication and the statutory alternative thereto as just described.

If an agency is uncertain in the light of recent court decisions as to whether particular types of agency records constitute (a)(2) materials*/ it can follow the index publication requirement and/or its statutory alternative, coupled with a statement that such action is being undertaken for the convenience of possible users of the materials

*/ See, e.g. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973), cert. granted and pending; Tax Analysts and Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), affirmed F.2d (1974). See also Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at pp. 20-22.

and does not necessarily constitute an agency determination as to whether such materials fall under subsection (a)(2) of the Act. If an agency is uncertain as to what constitutes an acceptable index, reference may be made to the statute itself -- "current indexes providing identifying information for the public as to . . . [(a)(2) materials]" -- and to prior Justice Department guidance on this point.*/

3. Uniform Agency Fees for Search and Duplication. The 1974 Amendments make significant changes in the law pertaining to the fees which an agency may charge for services performed for requesters under the Act. Each agency must "promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency." This means that agencies should, in accordance with 5 U.S.C. 553 (Rule Making), publish in the Federal Register a Notice of Proposed Rule Making well before January 20, 1975, containing a uniform schedule of fees which is proposed to become effective on February 19th, 1975, and then, after consideration of public comment, publish the regulations themselves as they will become effective on February 19th.

First, the required schedule must be uniform. In the case of large executive departments and agencies, the requirement for a "uniform" schedule of fees means that such schedule should ordinarily apply throughout the department or agency, even though such department or agency may contain major constituent parts which are more or less autonomous, which themselves may be "agencies" under the Administrative Procedure Act, see 5 U.S.C. 551, or under other parts of the Freedom of Information Act, and which issue their own regulations under other parts of these laws. It would violate the spirit of the uniform fee schedule requirement to promulgate a fee schedule for a constituent agency which is different from the schedule for the rest of the larger agency to which it belongs, except where such action

*/ See Attorney General's Memorandum of June 1967 as cited in preceding footnote.

is necessary in order to comply with the requirement that the amount of the fees (discussed as the "third factor" below under this heading) be "reasonable standard" charges based upon "direct costs."

For the convenience of all concerned, it is recommended that where separate Freedom of Information regulations are issued by or for constituent agencies within a larger department or agency, the constituent's regulations either repeat or refer to the fee schedule regulations of the larger department or agency.

In addition, since procedural requirements for notice and public comment involve more "lead time" for the fee schedule regulations than for the other regulation changes which the 1974 Amendments make necessary, separate timetables may be desirable for the tasks involved in finalizing the fee schedule regulations and the other regulations. However, provisions assigning functions and prescribing procedures for the administration of the fee schedule need not be contained in the schedule itself, and it may well be more practicable to include such provisions in the other Freedom of Information regulations.

Second, the kinds of services for which fees may be charged under the 1974 Amendments are limited to search and duplication. Agencies may thus no longer prescribe and charge fees (a) for time spent in examining the requested records to determine their contents for the purposes of determining whether they are exempt under the Act and whether even if exempt they should nevertheless be made available in whole or part, (b) for time spent in deleting exempt matter that is being withheld from records that are to be furnished with such deletions, (c) for time spent in monitoring a requester's inspection of agency records being made available to him in this manner, or for any other services outside of search and duplication.

Search services are services of agency personnel, whether clerical or if necessary at a higher-salaried level, used in trying to find the records sought by the requester, and include time spent in examining records for the purpose of determining whether they are within the scope of the request, as well as services needed to transport personnel to places of record storage to examine them for the purpose of search or to transport records to the location of such personnel for the purpose of search. Search services include services in a search which proves unsuccessful because no records ~~include~~ can be found, and also include services in an unproductive search, i.e., a search which does ~~not~~ locate records within the scope of the request, all of which however are determined to be included within the scope of the request

exempt and are withheld, ~~but~~ It is recommended that as a matter of policy requesters not be charged for unsuccessful or unproductive searches unless they have been given fair notice that such services may be charged for. Such notice should be plainly set forth in an agency's regulations and, in addition, it should where practicable also be timely conveyed to a particular requester in connection with any request which the agency has reason to believe may involve extensive search services ~~and~~ that ~~such services~~ may prove unsuccessful or unproductive.

Where the records involved are in computerized form, the meaning of "search" for purposes of promulgating fee schedules is somewhat broader. The fee schedule provisions of the 1974 Amendments, including the limitation of charges to search and duplication, originated in the Senate bill (S. 2543), and the Senate Report on that bill, No. 90-854 of May 16, 1974, stated at page 12 that "With reference to computerized record systems, the term 'search' would thus not be limited to standard record-finding, and in these situations charges would be permitted for services involving the use of computers needed to locate and extract the requested information."

Duplication includes costs associated with the paper, other supplies, etc., used to prepare the duplicates and the services of personnel used in such preparation.

Where an agency undertakes to perform for a requester or for any other person services which are very clearly not required to be performed under the Freedom of Information Act or the 1974 Amendments, either voluntarily or because such services are required by some other law, -- e.g., the formal certification of records as true copies, attestation under the seal of the agency, creation of a new list, tabulation or compilation of information, translation of existing records into another language, etc., the question of charging fees for such services should be resolved by the agency in the light of the federal user charge statute, 31 U.S.C. 483a, and any other applicable law. If for reasons of convenience

an agency elects to include charges for any such services in the fee schedule required to be promulgated by the 1974 Amendments, it should be made clear that such charges rest upon the authority of the user charge statute or law other than the Act and the 1974 Amendments.

The third factor to be determined by agencies in promulgating the required uniform fee schedule is the amount of the fees, ordinarily to be expressed as a rate per unit of service. For coping with this subject the 1974 Amendments afford an agency three general criteria: (a) its fee schedule should provide for recovery of only the "direct costs" of search and duplication services, (b) the fees shall be "reasonable standard" charges, and (c) charges shall be waived or reduced where the agency determines such action would be in the public interest because the information being furnished can be considered as "primarily benefiting the general public". The reference to "direct costs" can be taken to mean that no allocation of agency overhead expense should be added to the direct cost to the agency of the services used in conducting a search. This would exclude, e.g., utilities, training expenses, or management costs, although to the extent agency management is directly involved in performing or supervising searches such costs are not excluded. If, e.g., air freight or air express is used by an agency to transfer records at field offices to the office processing the request in order that the search can be completed and a determination made within applicable time limits, the actual cost to the agency of the air haul charge, but probably not the cost to the agency ordering such transportation and processing for payment the carrier's bill, may be considered to be direct costs.

The requirement for "reasonable standard" charges may be taken to mean that the actual rates to be charged must be stated in dollars and cents or otherwise definitively indicated*/ in the text of the schedule, precluding special

*/ As, for example, by reference to publicly filed tariffs.

rates based on negotiation,*/ upon increases in federal personnel pay rates not yet reflected in an amended schedule, upon minor differences in the current pay rates among the individuals who may perform services for which a fee will be charged, or upon other factors not incorporated in the schedule. However, there is no requirement in the 1974 Amendments that the schedule contain only a single rate for personnel time, and legislative reference to "direct costs" as noted above indicates that where there are sharp differences in the direct costs of search services as between those which can be performed by clerical personnel and those which involve professional, supervisory or other personnel paid at a much higher level, reasonable standard charges may be included in the schedule at two levels to represent the direct costs of each type of service. Such rates may be determined after considering the pay scales, converted to hourly rates, of the numbers and grades of the personnel who would be assigned to perform the required services. Recognizing that some mix of personnel may be involved, it would seem that reasonable approximations of costs should adequately meet the legislative requirement for "reasonable" standard charges.

The remaining legislative factor in the amount of fees is the provision concerning waiver or reduction, noted above. Either the fee schedule or the other agency regulations under the Act as amended should clearly assign the function of determining, both in connection with initial actions on requests and at the appeal stage, whether such waivers or reductions should be made and the amount of any such reduction.

4. Procedures on Requests for Classified Records. Passing for the purposes of this memorandum any constitutional questions, requests for documents that raise questions under exemption 1, as amended, will usually require more detailed administrative processing at both the initial and appeal stages than was required under the decision in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). Such processing will be subject to the new statutory time limits. The nature and degree of review which will be required at the

*/ This does not preclude a negotiated settlement of a dispute over the fees to be applied to a particular request.

initial and appeal levels under the 1974 Amendments is not entirely clear at this time. All agencies which generate or hold substantial amounts of classified documents should immediately begin considering a range of procedures for accommodating to the statutory changes. The Department of Justice solicits the views of affected agencies in this regard and anticipates issuing more detailed guidance for the processing of requests for classified documents under the 1974 Amendments prior to their effective date.

5. Requirements for Annual Report. The 1974 Amendments require each agency to prepare a detailed Annual Report to Congress with specified information. The first such report must be filed with Congress on March 1, 1975 covering activity during the calendar year 1974. Where agency records have not been prepared and assembled to provide the information that will be needed for the first and subsequent reports, necessary action to collect and compile such information should be launched promptly. Agencies setting up or improving systems for this purpose should consider whether the design of such systems may also serve to accumulate data on the costs of administering the Act, as such information may prove of interest to OMB, appropriations committees, and the Congress.

6. Assignment of Responsibility to Grant and Deny. Agency regulations should leave no avoidable uncertainty as to who has the responsibility for acting upon requests under the Act. Responsibility means the duty and the authority to act, and an assignment of either the duty or the authority normally carries with it the other, except as regulations may otherwise provide.

In accordance with the generally pro-disclosure policy of the Act and the 1974 Amendments, agencies should seek to distribute widely throughout their organizations as much authority to grant access as is practicable, and should confine authority to deny access to a very limited number of officials. When an inquiry or request for access is made to an agency employee or official which exceeds his authority to grant or deny, the inquirer or requester should be referred to the official or unit authorized in the agency's regulations to receive and/or determine such requests.*/

The employee or official who denies a request is referred to in several places in the 1974 Amendments. At the end of the last subparagraph of the time limit provisions (the amended 5 U.S.C. 552(a)(6)(C)), it is provided that "Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request." The required Annual Report is to include ". . . (3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each." The so-called sanctions provision (the amended 5 U.S.C. 552(a)(4)(F)) states that when a court acting in a

*/ As a matter of courtesy, if an initial inquiry or request in excess of the authority of the person to whom it was directed is contained in writing, that person ~~may~~ should undertake to redirect it to the proper part of the agency rather than leaving such redirection to the originator.

situation set forth in such provision makes a written finding as to possible arbitrary and capricious withholding by agency personnel, the Civil Service Commission shall promptly initiate a proceeding to determine "whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding."

The common element in these provisions is the characterization of an agency employee or official as the person "responsible" or "primarily responsible" for a denial. It is therefore incumbent upon an agency to fix such responsibility clearly in its regulations by confining authority to deny, both on initial determinations and on appeals, to specified officials or employees. In view of the time limits discussed above, it would appear to be impracticable to specify such officials or employees by their names, due to the possibility of absences, and specifications by organizational titles should be so drawn as to include both regular incumbents and persons acting in their stead.

Care should be taken to provide safeguards against confusion between the person who is authorized to deny access and the staffs which may work for or with him in furnishing assistance in the form of information, legal or policy advice and recommendations, or, in the case of a determination to grant in part and deny in part, assistance in implementing such a determination. Care should also be taken to safeguard against the possibility that the official or employee whose name and title appear on a notification of denial as ostensibly the responsible person, as indicated by his signature, may in fact be acting on the orders of his superior. In such a case, the superior and not the subordinate is the responsible person for the purposes of the provisions referred to above, and determinations to deny issued in such circumstances should accordingly identify the superior as the responsible person, with the subordinate signing "by direction" or with other appropriate indication of his role. If an agency elects to vest authority to deny at either the initial or appeal stage in a multi-member body, provision should be made for identifying those

members who join in a particular denial, but this is not required if the functions of such a body are limited to furnishing assistance, advice and recommendations to the authorized decision-maker.

7. Retrospective Aspects. The 1974 Amendments include 3 provisions whose nature is "substantive", in the sense that they affect what records are subject to compulsory disclosure under the Act, rather than how requests for records shall be processed or litigated. These 3 provisions are a revision of the 1st exemption (pertaining to documents classified for reasons of defense or foreign policy), a revision of the 7th exemption (investigatory law enforcement records), and a provision on the availability of "reasonably segregable" portions of records from which exempt matter has been deleted. It is contemplated that these three provisions will be discussed and interpreted in a more detailed analysis of the 1974 Amendments which the Justice Department plans to make available by the time they become effective. (See item 9 of this Memorandum, "Further Action", below.)

While these 3 substantive changes, like the rest of the 1974 Amendments, do not become effective until February 19, 1975, agencies should note that these changes can be expected to have certain impacts after that date on matters existing or pending at that time, as follows: (a) records created or acquired and maintained by an agency before the effective date will become subject to these changes; (b) requests or administrative appeals filed before and still pending in the agency on the effective date will become subject to these changes; and (c) litigation that is pending but undecided on the effective date will become subject to them. Accordingly, each agency should take these three changes into account to the best of its ability even before they become effective, particularly in its processing of requests and appeals and in assisting in the conduct of litigation.

8. Miscellaneous Matters. The 1974 Amendments change the Act's requirement that a request be for "identifiable records", and substitute in lieu thereof that a request for

records be one which "reasonably describes such records". Agency regulations which contain provisions that parallel the old "identifiable records" language should be revised accordingly.

The 1974 Amendments contain certain provisions, set forth in the same places as the administrative time limit provisions, requiring that any adverse initial determination set forth the reasons therefor and a notice of the requester's appeal rights, and that any adverse determination on appeal give notice of the requester's rights of judicial review. Agency regulations should be amended in the light of this new legislative language to reflect these requirements.

In the event of suit under the Act, the government's time to answer is reduced from the customary 60 days available to the government in civil actions to 30 days "unless the court otherwise directs for good cause shown". At the end of a suit under the Act in which the requester has "substantially prevailed", the court may assess "reasonable attorneys fees and other litigation costs reasonably incurred". While neither of these changes necessarily calls for a revision of agency regulations, each can have an impact on agency operations: if a judicial extension of the 30-day time period is to be sought, the agency is likely to be called upon to provide information as to the facts and circumstances believed to constitute "good cause", and if attorney's fees are assessed, they will be charged to the agency whose withholding of records was at issue in the suit.

Each agency should carefully examine the text of the 1974 Amendments to see if there are impacts upon its own regulations or operations that may not apply to other agencies or which are not discussed herein. Such examination will also help to make sure that the revisions to be made are in fact compatible with the statute.

9. Further Action. The Justice Department plans to prepare for distribution to agencies before the effective

date of the 1974 Amendments an interpretive and advisory "Analysis" of these Amendments, primarily addressed to the three "substantive" provisions referred to in item 7 above, but possibly also containing further guidance on procedural questions such as are discussed herein.

Those agencies which anticipate that they will have considerable need for internal coordination, not only in preparing to comply with the 1974 Amendments but in administering the Act after they become effective, and which have reason to expect that achieving such coordination may involve sizable and complex problems, should consider setting up an internal monitoring council or board to strengthen the agency's ability to meet these demands. Such a council might include (a) toplevel representation or chairmanship, including both a presidential appointee and a senior career official, (b) legal talent, (c) public information talent, (d) senior operating representation from major operating components, (e) records management experts, and (f) experts in the budget and training areas.

Until the Department's Analysis referred to above is completed, it would be appreciated if requests from agencies for advice and assistance in drafting regulations or on other matters under the Act be kept to a minimum. However, comments on this Preliminary Guidance memorandum are solicited, with a view to making desirable additions and changes. In addition, each agency is requested to furnish this Department, Attention Office of Legal Counsel, with 2 copies of any regulation or Notice of Proposed Rulemaking responsive to the 1974 Amendments as soon as such regulation or notice is issued, and in the form in which it is issued.

Attachments

ATTACHMENTS
A through D

(Attachments are omitted on this draft)

MEMORANDUM FOR: [redacted]TATINTL

Ed Proctor asked me to send this along to you for action. I will also forward the OGC comments when we get them.

A copy has also been sent to Harry Eisenbeiss.

Neil

6 Dec 74
(DATE)

FORM NO. 101 REPLACES FORM 10-101
1 AUG 54 WHICH MAY BE USED. (47)

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Department of Justice Guidance on Freedom of Information Act Implementation

FROM:	EXTENSION	NO.
[redacted] STATINTL Associate General Counsel	7522	
		DATE 5 December 1974

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. DD/I 7E-44				Attached is a copy of the memorandum from the Department of Justice dated 2 December 1974, which reached us late yesterday, asking agencies to comment on Justice's proposed guidance to agencies, the comments to be submitted by 2:00 p.m. Friday, 6 December.
2. DD/O 7E-26				
3. DD/A 7D-26				
4. DD/S&T 6E-60				
5. D/DCI/IC 7E-13				In view of the tight deadline and because the matter is substantially one of law, OGC is preparing and forwarding to Justice comments which we will designate as CIA preliminary comments. Thereafter upon receipt of comments from addressees, we will submit such additional comments to Justice as may be in order.
6. D/DCI/NIO 7E-62				
7. Inspector General 2E-24				
8. Legislative Counsel 7D-43				
9. Mr. Thuermer Asst. to the Director				We expect to have our preliminary comments available tomorrow morning and we will submit these to addressees also. We hope our comments will be useful to an analysis and understanding of the Justice communication.
10. 1F04				
11.				
12.				
13.				If possible, request comments to OGC by close of business Monday, 9 December.
14.				STATINTL [redacted]
15.				

File Freedom of Info Act

MEMORANDUM FOR: Messrs. Proctor/Walsh

Deadline for our comments (if any) on this DOJ advisory on the amended Freedom of Information Act is COB Monday. We may not really have comments at this point.

Should I have a copy handcarried to [redacted] STATINTL

STATINTL [redacted]

Yes EWP No _____

What instructions? Comply with

Neil

Other dissem? [redacted] request. STATINTL

STATINTL [redacted]

Ernie Beiss None 12/6/74

5 Dec 74
(DATE)

FORM NO. 1 AUG 54 101 REPLACES FORM 10-101 WHICH MAY BE USED. (47)